United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL WITH PROOF OF SERVICE

77-7147

To be argued by
MICHAEL E. STERN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

JULIE BAKER,

Plaintiff-Appellee,

v.

THE CITY OF NEW YORK,

Defendant-Appellant,

ROBERT E. BLISS,

Defendant-Appellee,

STUART V. SCHILLER, LEE E. JOHNSON,

Defendants.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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UNITED STATES COURT OF APPEALS
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JULIE BAKER,

Plaintiff-Appellee,

v.

THE CITY OF NEW YORK,

Defendant-Appellant,

ROBERT E. BLISS,

Defendant-Appellee,

STUART V. SCHILLER, LEE E. JOHNSON,

Defendants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

PRELIMINARY STATEMENT

This appeal concerns an action to recover damages for personal injuries sustained by the plaintiff, a passenger in a vehicle

owned by the defendant, Robert E. Bliss. Bliss' vehicle was struck by a Ford Thunderbird which was being pursued, at a high rate of speed, down Lexington Avenue by a New York City police car. It is undisputed that the Ford Thunderbird entered the intersection where the accident took place against a red traffic light.

The case was tried in the United States District Court of the Southern District of New York before Hon. Dudley B. Bonsal and the jury rendered a verdict in favor of the plaintiff against the defendant City of New York only. The jury exonerated the defendant Bliss.

The defendant-appellee Bliss is satisfied with the statements of facts presented in the briefs of the defendant-appellant City of New York and the plaintiff-appellee.

ISSUE PRESENTED

The issue presented by the defendant Bliss on the appeal concerns the City's request for a reversal or, in the alternative, for a new trial.

It is the contention of the defendant Bliss that if a new trial is granted, such new trial should be granted only as against the City of New York and that the verdict and judgment in favor of the defendant Bliss should not be disturbed.

The defendant Bliss, in addition, generally supports the

position of the plaintiff in this appeal, namely, that there was sufficient evidence for the jury to conclude that the City was liable to the plaintiff and that there was nothing improper about the Court's charge; in sum, that the verdict and judgment below were, in all respects, proper.

POINT I

THE APPELLATE COURT IS EMPOWERED TO GRANT A NEW TRIAL AS AGAINST THE CITY OF NEW YORK ONLY, ASSUMING A NEW TRIAL IS WARRANTED.

The authority for the appellate court to grant a partial new trial as against fewer than all of the original defendants is found in Rule 59(a) of the Federal Rules of Civil Procedure, which provides that

> "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States...."

Although Rule 59, and, indeed, the Federal Rules generally, do not specifically apply to the Court of Appeals, there is no question about the power of the Court of Appeals to invoke the Rule. See, generally, Wright and Miller, Federal Practice and Procedure, Vol. 4, sec. 1012.

Moreover, it would appear that Rule 59 is nothing more than

the embodiment of what is now the common law of the majority of jurisdictions in the United States, including the State of New York. At early common law, it was generally held that where a new trial was required as to some joint tort feasors, a new trial was required as to all. However, this rule has been rejected. In Gasoline Products Company v. Champlin Refining Company, 283 U.S. 494, 51 S.Ct. 513 (1931), the Supreme Court specifically rejected the all or nothing, common law approach. In the State of New York, the antiquated common law rule has long been in disfavor. A corollary to Federal Rule 59 is found in C.P.L.R. 5522, which has its origins in the Field Code of 1848. The courts of the State of New York abandoned the common law rule long ago. See, for example, Draper v. Interborough Rapid Transit Co., 124 App.Div. 357, 108 N.Y.S. 692 (1908), and a more recent case, Leskody v. Atlantic Stevedoring Co. Inc., 21 A.D. 2d 894, 251 N.Y.S. 2d 882 (1964).

There is, therefore, no question but that the Court of Appeals is empowered to grant a partial new trial, as against the City of New York only, assuming the Court concludes that a new trial is warranted in the first instance.

POINT II

THE COURT OF APPEALS, IN THE SOUND EXERCISE OF DISCRETION, SHOULD (IF A NEW TRIAL IS WARRANTED) GRANT ONLY A PARTIAL NEW TRIAL AGAINST THE CITY OF NEW YORK ONLY AND SHOULD NOT DISTURB THE VERDICT AND JUDGMENT RENDERED IN FAVOR OF THE DEFENDANT BLISS.

As stated above, the defendant Bliss believes that the judgment below was proper in all respects and should not be disturbed. However, recognizing the possibility that the Court may grant a new trial, the defendant Bliss is constrained to argue that if a new trial is granted, it should not involve the defendant Bliss but should, on the other hand, be against only the City of New York.

A motion under Rule 59 is addressed to the discretion of the court. Globe Liquor Co. v. San Roman, 332 U.S. 571, 68 S.Ct. 246 (1948); Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212, 67 S.Ct. 752 (1947); Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189 (1940); Diapulse Corp. of America v. Birtcher Corp., 362 F.2d 736 (2nd Cir. 1966), cert. dism. 385 U.S. 801, 87 S.Ct. 9 (1966).

If it appears that a verdict was proper as to one party and improper as to the other, it should be upheld as to the former and reversed as to the latter. Constitution Pub. Co. v. Dale, 164 F2d 210 (5th Cir. 1947); Leskody v. Atlantic Stevedoring Co. Inc., supra;

Goldstein v. City of New York, 281 App. Div. 712, 118 N.Y.S. 2d 48 (1952).

The verdict below was proper in all respects, especially insofar as it exonerated the defendant Bliss from liability to the plaintiff. It is uncontroverted that the Ford Thunderbird passed a red light as it entered the intersection where the accident occurred; conversely, it is uncontroverted that the vehicle owned and operated by the defendant Bliss, in which plaintiff was a passenger, entered the intersection with the green light. References to these uncontroverted facts can be found in the brief of the City of New York, pp. 1, 6, 23, and 30, and in the brief of the plaintiff on pp. 1, 2, 6, 9 and 10.

Plaintiff contends that, as appellee, she "is entitled to the benefit of the most favorable inferences that may reasonably be drawn from the evidence (Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F. 2d 1036, 1042 [2d Cir. 1976])." Defendant Bliss is similarly entitled; clearly, the evidence adduced at trial completely supports the jury verdict in favor of defendant Bliss.

Moreover, plaintiff's counsel, in summation, conceded that there was no negligence on the part of defendant Bliss (183, 184).

It is notable that neither the City nor the plaintiff contend, on this appeal, that the jury verdict in favor of defendant Bliss was improper in any way.

In view of the above, it is clear that the verdict in favor of Bliss was proper and should be upheld, irrespective of whether a new trial is granted as against the City. It is also clear that no one will be prejudiced if a new trial should proceed without the presence of Bliss as a party defendant. The plaintiff's theory of liability is that the City's manner of pursuit constituted actionable negligence under the circumstances. The condition of the traffic light at the intersection where the accident took place has no bearing on whether the manner of pursuit was proper or improper. Therefore, the absence of Bliss as a defendant upon a re-trial will not prejudice plaintiff in the prosecution or presentation of the case against the City nor will it prejudice the City in its defense. The defendant Bliss was already exonerated by the jury in a trial lasting several days and should not have to face a re-trial under the facts and circumstances presented in this case.

CONCLUSION

It would be improper for the defendant Bliss to advance the argument eloquently set forth in the plaintiff's brief. Suffice it to say that the defendant Bliss supports the plaintiff's contentions and the plaintiff's conclusion that the judgment appealed from should be affirmed.

Bliss' particular interest, obviously, is that the judgment

appealed from, insofar as it exonerated the defendant Bliss from liability, should be affirmed, even if the Court should grant a new trial against the City of New York.

In view of the verdict below, the totality of the facts and circumstances presented, the fact that neither of the other parties have set forth any objection as to the verdict in favor of Bliss and the fact that no prejudice can possibly result to either the plaintiff or the City of New York if only a partial new trial (against the City only) is granted, the Court should not disturb the verdict and judgment rendered in favor of defendant Bliss and should, if a new trial is granted, grant such new trial against the City only.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

ROBERT MANIERO, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 21 12 25 RD ASTORIA N.Y.

That on the 16 day of SEPTEMBER, 1977, deponent personally served the within BRIEF FOR DEFENDANT-APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979